

City of Atwater



OFFICE OF THE CITY MANAGER
750 BELLEVUE ROAD
ATWATER, CA 95301
(209) 357-6201

TO: Police Chief Samuel Joseph
FROM: Lori Waterman, City Manager
RE: Final Notice of Termination
DATE: November 15, 2018

Pursuant to Government Code section 3304, subdivision (c) and Section 2.2 of your Employment Agreement ("Agreement") with the City of Atwater ("City"), this Notice is to inform you of my decision to terminate your employment as Police Chief with the City for willful and other misconduct. Your termination will be effective immediately. Pursuant to the City's Municipal Code and Government Code section 3304, subdivision (c), my decision is final.

I. RECOMMENDATION FROM ADMINISTRATIVE APPEAL HEARING

The City issued your proposed Notice of Discipline and notice of appeal rights on September 28, 2018. You notified the City of your decision to appeal your proposed discipline, pursuant to Government Code section 3304, subdivision (c), on September 29, 2018.

Your administrative appeal hearing was scheduled for December 5-7, 2018. On November 7, 2018, your representative notified the City and Retired Justice Steven Vartabedian, the selected Arbitrator appointed to hear your appeal, that you refused to participate in the scheduled administrative appeal hearing. On November 9, 2018, the City informed you that, since you refused to participate in the scheduled hearing before Mr. Vartabedian, the City would move forward with the disciplinary process.

On November 13, 2018, your representative notified the City that you were not withdrawing your appeal, but again refused to attend the scheduled hearing date before Mr. Vartabedian. The City again notified you on November 14, 2018 of the date and time of your scheduled appeal hearing before Mr. Vartabedian. On November 15,

2018, your representative again informed the City that you refused to attend or participate in the scheduled appeal hearing before Mr. Vartabedian.

Since you refused to provide any oral or written response to the information cited in the Notice of Intended Discipline, or otherwise participate in the scheduled administrative appeal hearing, I only have the evidence gathered during the administrative investigation and additional information attached to the Notice of Intended Discipline to rely on in making my final decision. Based on my careful review of all the evidence, I have decided to uphold the proposed termination.

II. RULES VIOLATED

A. *Lexipol*

- (1) Policy 205.3 Prohibited Use of Email: Sending derogatory, defamatory, obscene, disrespectful, sexually suggestive and harassing or any other inappropriate messages on the email system is prohibited and may result in discipline.
- (2) Policy 322.3.1: Supervisors shall not knowingly issue orders or directives that, if carried out, would result in a violation of any law or department policy. Supervisors should not issue orders that conflict with any previous order without making reasonable clarification that the new order is intended to countermand the earlier order.
- (2) Policy 322.5.1 Laws, Rules and Orders:
 - (a) "Violation of or ordering or instructing a subordinate to violate any policy, procedure, rule, order, directive, requirement or failure to follow instructions contained in department or City manuals."
 - (c) "Violation of federal, state, local or administrative laws, rules or regulations."
- (3) Policy 322.5.7 Efficiency:
 - (b) Unsatisfactory work performance including, but not limited to, failure, incompetence, inefficiency, or delay in performing and/or carrying out proper orders, work assignments, or the instructions of supervisors without a reasonable and bona fide excuse.
 - (e) Disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this department or subverts the good order, efficiency, and

discipline of this department or that would tend to discredit any of its members.

- (i) Any act on- or off-duty that brings discredit to this department.
- (4) Policy 322.5.9 Conduct:
 - (f) Discourteous, disrespectful, or discriminatory treatment of any member of the public or any member of this department or the City.
- (5) Policy 701.6 Use of PCD:
 - (g) Using PCDs to harass, threaten, coerce or otherwise engage in inappropriate conduct with any third party is prohibited. Any member having knowledge of such conduct shall promptly notify a supervisor.

B. Penal Code

- (1) Penal Code section 32310: "Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year of imprisonment pursuant to subdivision (h) of Section 1170."
- (2) Penal Code section 32400: "Section 32310 does not apply to the sale of, giving of, lending of, possession of, importation into this state of, or purchase of, any large-capacity magazine to or by any federal, state, county, city and county, or city agency that is charged with the enforcement of any law, for use by agency employees in the discharge of their official duties, whether on or off duty, and where the use is authorized by the agency and is within the course and scope of their duties."
- (3) Penal Code section 32415: "Section 32310 does not apply to the loan of a lawfully possessed large-capacity magazine between two individuals if all of the following conditions are met:

- (a) The person being loaned the large-capacity magazine is not prohibited by Chapter 1 (commencing with Section 29610), Chapter 2 (commencing with Section 29800), or Chapter 3 (commencing with Section 29900) of Division 9 of this title or Section 8100 or 8103 of the Welfare and Institutions Code from possessing firearms or ammunition.
- (b) The loan of the large-capacity magazine occurs at a place or location where the possession of the large-capacity magazine is not otherwise prohibited, and the person who lends the large-capacity magazine remains in the accessible vicinity of the person to whom the large-capacity magazine is loaned."

III. FACTS PERTAINING TO WILLFUL MISCONDUCT

Willful misconduct means dereliction of duty; voluntary or intentional improper behavior. Any act of willful misconduct constitutes grounds for discipline, up to and including termination.

A. Issuing Firearm with a High Capacity Magazine to Non-Sworn City Employee

In or about September 2017, you ordered Sgt. David Sarginson to issue a .9 mm handgun with a high capacity magazine to a code enforcement officer who failed a psychological examination and was not a sworn peace officer. This employee was only asked to return the weapon after Sgt. Echevarria stepped in as Interim Police Chief. You knew this employee failed a psychological examination, yet you allowed him to possess and carry a City-issued firearm with a high-capacity magazine anyway, in violation of the Penal Code. Presumably, had you not been placed on paid administrative leave, this employee would have retained a dangerous City issued weapon despite not being legally allowed to possess a high capacity magazine and after failing a psychological exam.

You testified during your Administrative Investigation ("AI") interview that former City Manager John Bramble directed you to issue the employee a firearm so that he could obtain POST re-certification. However, you knew the employee had not passed his psychological exam and would not be re-tested for another six (6) months. Furthermore, even if Mr. Bramble instructed you to assist the employee with obtaining his POST re-certification – at the very most – you should have only allowed the employee to use the firearm at the range under your supervision, and then retrieved

the firearm before the employee left the range. Instead of that, you allowed a civilian to possess a firearm with a high capacity magazine with no supervision.

As a police officer with more than thirty (30) years' experience and the City's Chief of Police, you are surely aware that allowing a civilian who just failed a psychological examination to possess and carry a .9 mm handgun with a high capacity magazine is illegal, creates serious liability for the City, and demonstrates very poor judgment.

You knew this employee failed his psychological examination because you spoke the doctor who administered the exam. You told the investigator that the doctor told you the employee could just re-test however, the doctor issued a report that stated the employee may not re-test for another six (6) months. Despite this employee's questionable psychological background, you still issued him a firearm with a high capacity magazine in violation of the Penal Code. Your conduct constitutes willful misconduct.

B. Refusal to Address Issues with the Evidence Room and Locker

You knew the City's police department evidence room and locker were not properly secured and was open to anyone who wished to enter. The evidence locker was simply an open safe because no one had the combination to lock it. The refrigerator where biological evidence was stored did not work properly and was overflowing causing the door to open.

You were very familiar with the 2010 POST report that directed the City to undertake significant changes to the evidence room and you were Chief of Police for a year before being placed on paid administrative leave. Despite these facts, you took no action to at least ensure that evidence was not tampered with, removed, or so degraded as to be useless in a criminal prosecution.

Your failure to address issues with the City's evidence room has raised serious concerns about the integrity of the chain of custody for evidence in ongoing criminal cases. District Attorney Larry Morse stated he was required to disclose the state of the evidence room to defendants and their attorneys because it may constitute exculpatory evidence. The evidence room and locker were also reported to the California Attorney General's Office.

Your failure to address the issues with the evidence room and locker may threaten public safety by risking possible convictions or resulting in overturned convictions. Your desk was just ten (10) feet from the evidence room while you were Chief of Police.

Yet you never made any attempt to address the free and open access to evidence in criminal cases.

During your AI interview, you blamed past Chiefs of Police and said you did not have the resources to repair the evidence room. However, you never requested any investigation or study of the evidence room and locker. You never even installed a sign in sheet to track who came and went from the evidence room. Yet, as soon as an Interim Police Chief was appointed, the evidence room and locker issues were immediately addressed. You further alleged that former Sacramento County Sherriff John McGuinness was friends with former City Manager Art de Werk and, as a result, is only identifying these issues to be unfair to you. Yet, when Chief Bessinger was appointed, he had similar concerns about the evidence room and locker as did POST in 2010 and the AG's office now. Instead of taking any responsibility for your actions, you continue to pass the blame on to others.

As an experienced and educated police chief, one who has attended the FBI academy, you were most certainly aware that the City's evidence room and locker fell well below the minimum standards for the operation of a police evidence room. Your failure to take any action on the state of the evidence room since being appointed police chief and refusal to take any responsibility for your actions constitutes willful misconduct and a violation of the City's Personnel Rules.

C. Inappropriate Order to Subordinate Officer

During his AI interview, former Code Enforcement Officer Fabian Velazquez testified that you ordered him to remove and copy a letter he found on a Finance Department employee's desk. This letter was not addressed to you and was on someone else's desk. Rather than admonish your subordinate for looking at or taking documents off other people's desks, you ordered your subordinate to take the letter off the Finance Department employee's desk without her permission, photocopy it, and send it to you. Regardless of what the letter was about or to whom you provided the letter, it is was unprofessional and inappropriate for you to order a subordinate to copy and give to you a document he had taken without permission from another employee's desk. During your AI interview, you admitted you told Velazquez to copy and send you the letter but said that you provided it to de Werk. However, you also stated you only asked for the letter in order to give it to your attorney. However, in a text message, it is clear you instructed Velazquez to copy the letter and disseminate it all over the Police Department because it was critical of de Werk. You texted, "*Fabian somehow get this paper put it everywhere in the PD on the ground print up copies they have to read this she fucked them.*"

If this correspondence was relevant to you or the Police Department, it would have been provided to you by City staff. Your decision to countenance a subordinate to invade someone else's work space; remove and copy a document; and then distribute that document to as many people as possible is terribly inappropriate. The City is not your personal fiefdom wherein you are entitled to know every detail of City business. Your conduct violates the City's Personnel Rules and constitutes willful misconduct.

D. Intentionally Harassing and Intimidating Behavior

The AI revealed that you regularly engaged in harassing, insulting, and intimidating behavior toward your subordinates. You improperly questioned officers about concerted union activity, insulted officers to each other, and repeatedly threatened to terminate employees and "ruin their lives." After a union meeting in late 2017, you asked at least two officers what occurred at the meeting. As a supervisor, it is inappropriate for you question employees about confidential union matters.

Furthermore, questioning employees about union activity creates liability for the City in the event you decide to take any adverse action against an employee because he or she may allege retaliation. As an experienced supervisor, you are surely aware of the sanctity of protected union activity.

Additionally, you repeatedly argued that even if the employee prevailed during appeal and returned to work, *"they would be financially ruined, and their wife and kids would hate them."* Your conduct constitutes an intentional violation of the City's Personnel Rules.

Finally, the AI also revealed that you used a City computer and equipment during work hours to send insulting memes and photos about subordinate officers to other members of the department. You also regularly used profane language in communicating to employees. You sent two photos that contained caricatures of three employees to a City code enforcement officer. Harassing, offensive, and intimidating conduct violates the City's Personnel Rules and further exposes the City to significant liability. As Chief of Police, it is your duty to protect the City and set the highest standards for conduct. Your intentional discourteous treatment of subordinate officers violates the City's Personnel Rules and constitutes willful misconduct.

IV. OTHER MISMANAGEMENT ISSUES

Government Code section 3304, subdivision (c) states that a police chief may be removed from office for reasons including incompatible management styles. The AI revealed that you have engaged in mismanagement and poor supervisory skills that are incompatible with the City's goals and standards for department heads.

A. Failure to Properly Supervise Subordinates

The AI revealed that you did not properly supervise subordinate employees responsible for tasks such as evidence tracking and logging and sealing juvenile records. During your AI interview, you blamed Administrative Supervisor Tyna Lamison for the complete lack of evidence control at the department and Sgt. Wisdom for failure to seal juvenile records. You never made any attempt to address Lamison's alleged failure of evidence control and certainly never attempted to resolve issues with the evidence room.

B. Failure to Properly Maintain Records and Firearms

During the AI, it was revealed that you left an unsecured firearm, background investigation materials, internal affairs documents, and training records in an unsecured locker. After you were placed on paid administrative leave, former Interim Police Chief Echeverria and Tyna Lamison cleaned out the locker used by you during your employment, which included several items that should have been properly filed and secured. Your locker was accessible to any number of people, including custodial staff. Background materials and internal affairs documents are confidential and should not be accessible to anyone.

Additionally, you had an unsecured firearm in your locker that was also accessible to anyone. As the Chief of Police, you are obligated to set the best possible example for performance and compliance with the City rules. Instead, you demonstrated carelessness and lack of concern for safety and confidential documents.

C. Disclosure of Confidential Information

The AI revealed that you intentionally disclosed confidential information to third party non-City employees for your own personal gain, including a draft City employment agreement and confidential attorney-client communications. You testified that you believed you had the right to waive the attorney-client privilege even though the privilege is held by the City. You are an experienced City employee and the former Public Information Officer for the City Police Department. It is inconceivable that you

were not aware that you may not waive privilege and produce confidential City materials to non-City third parties for personal gain.

Furthermore, you stated you may have sent out a draft employment agreement because you were not aware of any rule that prevented you from distributing confidential draft employment agreements. Your complete refusal to take any responsibility for your poor judgment demonstrates your mismanagement. You are not a rank and file employee. You are the Chief of Police. Accordingly, you are assumed to possess good judgment and a comprehensive understanding of your obligations to the City.

D. Irresponsible Handling of Background Investigation

In or about September 2017, you hired a Police Officer applicant with a criminal arrest record. You knew the applicant had a criminal arrest record and assigned another employee who was friends with the applicant to conduct the background investigation. Even if this candidate had no history of criminal conduct, asking an applicant's friend to conduct a background investigation constitutes very poor judgment. This applicant was not only arrested but convicted of a felony.

Regardless of the facts or circumstances underlying that arrest or conviction, at the very least – you should have assigned a neutral person to conduct the background investigation before agreeing to hire someone as a police officer who was previously a convicted felon. This could have created millions of dollars in liability for the City if this employee was involved in an on-duty use of force incident or if he committed another crime. Your poor decision to assign this applicant's background investigation to the applicant's friend constitutes mismanagement and demonstrates an incompatible management style.

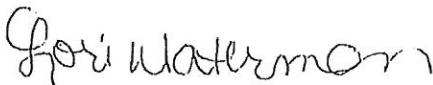
V. WARNING AGAINST RETALIATION

This provision is to notify you that it is illegal and inappropriate to retaliate against any person who has participated in complaining or providing information regarding your alleged misconduct, or anyone you suspect may have participated in complaining or providing information regarding your alleged misconduct.

VI. DOCUMENTS RELIED UPON IN SUPPORT OF FINAL NOTICE OF TERMINATION

Documents listed in Nos. 1-6 were attached to the Notice of Proposed Discipline dated September 28, 2018. Please let the City know if you need any copies. Documents listed in Nos. 7-13 are attached hereto.

1. Investigation Report
2. Employment Agreement
3. Government Code section 3304, subdivision (c)
4. Penal Code sections 32310, 32400, and 32415.
5. Lexipol Policies 322.3.1, 322.5.1, 322.5.7, 322.5.9, and Policy 701.6.
6. Correspondence between District Larry Morse and Interim Chief Dew Bessinger dated July 9, 2018.
7. Email correspondence dated November 7, 2018 between Michael Rains, the City, and Hon. Steven Vartabedian.
8. Correspondence between Kimberly A. Horiuchi and Michael Rains regarding Samuel Joseph Appeal dated November 9, 2018.
9. Email correspondence between Michael Rains and Kimberly A. Horiuchi dated November 13, 2018.
10. Email correspondence between Michael Rains and Kimberly A. Horiuchi dated November 14, 2018.
11. Correspondence between Douglas L. White and Michael Rains dated November 14, 2018.
12. Correspondence between Michael Rains and Douglas White dated November 15, 2018.
13. Correspondence between Douglas White and Michael Rains dated November 15, 2018.



Lori Waterman
City Manager
City of Atwater